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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN TOBACCO COMPANY, TOBACCO WORKERS' INTERNATIONAL UNION, AND LOCAL 182 OF TOBACCO WORKERS' INTERNATIONAL UNION,

Petitioners,

v.

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR,

Respondents.

AMERICAN BRANDS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS THE AMERICAN TOBACCO COMPANY AND AMERICAN BRANDS, INC.

(Names and addresses of attorneys on inside cover)

HENRY T. WICKHAM (Counsel of Record for American)
STEPHEN A. NORTHUP
MAYS, VALENTINE, DAVENPORT & MOORE
P.O. BOX 1122
Richmond, Virginia 23208
(804) 644-6011

PAUL G. PENNOYER, JR.
BERNARD W. MCCARTHY
PETER N. HILLMAN
MARY T. YELENICK
CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10112
(212) 541-5800

Counsel for Petitioners The American Tobacco Company, a Division of American Brands, Inc., and American Brands, Inc.

Question Presented

Whether the immunity from Title VII liability given to bona fide seniority systems under § 703(h) applies to seniority systems instituted or revised after the effective date of Title VII.*

*American Brands, Inc. has no parent, subsidiary or affiliate required to be reported under S. Ct. R. 28.1.

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Opinions Below

The *en banc* opinion of the Fourth Circuit as to which relief is here sought appears at 634 F.2d 744 (1980) and is reprinted in the Joint Appendix (JA 135-184). Previous opinions of the Fourth Circuit in these cases are reported at 535 F.2d 257, *cert. denied*, 429 U.S. 920 (1976) (JA 70-107) (*"Patterson I"*), and 586 F.2d 300 (1978) (JA 112-134) (*"Patterson II"*). Previous opinions of the district court are unofficially reported at 8 Fair Empl. Prac. Cas. 778 (1974) (JA 2-49) (post-trial opinion on liability); 11 Fair Empl. Prac. Cas. 577 (1974) (JA 50-69) (opinion on relief); and 18 Fair Empl. Prac. Cas. 377 (1977) (JA 109-111) (order denying motion to reconsider and vacate prior findings of liability).

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on November 18, 1980. The petition for a writ of certiorari was timely filed on January 15, 1981 and was granted on June 15, 1981.

Statutory Provision Involved

Section 703(h) of Title VII provides (42 U.S.C. § 2000e-2(h)):

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is

not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of Title 29.

Statement of the Case

These are employment discrimination cases, consolidated for trial, in which the plaintiffs alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, at two separate plants of The American Tobacco Company, a Division of American Brands, Inc. (hereinafter collectively "American") located in Richmond, Virginia. One facility, the Virginia Branch, manufactured cigarettes and the other, the Richmond Branch, manufactured pipe tobacco. Respondents John Patterson, et al., were plaintiffs in one case, a class action alleging race discrimination, and respondent Equal Employment Opportunity Commission was plaintiff in the other, alleging both race and sex discrimination.[1] American was a defendant in both cases, as was the local union (Local 182 of The Tobacco Workers' International Union).[2] The International Union was a defendant in the *Patterson* case only.

No finding of present intent to discriminate was made following the trial in 1974.[3] Evidence showed, and the courts below recognized, that commencing even prior to the enactment of

[1]Plaintiffs in the *Patterson* case alleged violations of the Civil Rights Act of 1866, 42 U.S.C. § 1981, in addition to their Title VII claims.

[2]At the direction of the court of appeals in *Patterson I*, Local 182 was dismissed in the *EEOC* case.

[3]"Even without specific proof of overt or particular acts of discrimination, the statistical evidence is more than sufficient to establish a *prima facie* case of discrimination for the two branches" (district court, JA 9); "[t]he evidence in this case upon which the district court found liability was statistical. That court did not find 'specific proof of overt or particular acts of discrimination.' The whole case must be read with that background" (Widener, J., dissenting in *Patterson II*, JA 122).

Title VII, steps had been taken to eliminate discrimination, including the merger of formerly black-white unions in September 1963 (JA 19-20, 75), elimination of segregated facilities and abolishment of departmental seniority in 1963 (JA 32, 75), cessation of discriminatory hiring (JA 9-10, 73), and affirmative efforts with regard to hiring (JA 10). Further steps were taken in January 1968[4] when a posting and bidding procedure replaced a canvassing procedure for awarding jobs under the already existing plant-wide seniority system (JA 21, 28, 76) and either nine lines of progression were "adopted" (JA 142-43 & n.4)[5] or numerous lines "were *eliminated*, except for the nine lines at issue here" (JA 162; emphasis in original).[6]

The district court found specifically that there had been no post-Act discrimination in hiring (JA 9-10). It also found that American's seniority system was "facially fair and neutral" (JA 7). Liability was premised on the basis of present effects of past discrimination which "constitute, in the Court's view, continuing violations of Title VII" (*id.*). The district court summarized its liability holding in language recognizing that much had been done to eliminate discrimination[7] and that the

[4]The charges underlying the *Patterson* case were filed in January and February, 1969, and the charge underlying the *EEOC* case was filed on April 8, 1969 (JA 6).

[5]Notwithstanding the absence of any specific finding by the district court, the majority below, *sua sponte*, found as a fact that the lines of progression first came into existence in 1968 after the effective date of Title VII. This finding was made even though the specific question as to when the lines of progression were first instituted had not been an issue at the trial, which occurred years before this Court's decisions in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) and *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598 (1980).

[6]As this language from the dissenting opinion below indicates, there is a genuine factual dispute on the current record as to whether the lines of progression indeed antedated the effective date of Title VII. Solely for purposes of this appeal, petitioners are treating the lines of progression as having come into existence after Title VII's effective date.

[7]Following the 1963 and 1968 changes, the vast majority of jobs were open for bidding by all employees and awarded to the most senior bidder, the lines of progression involving only two or three job classifications each out of the 200-plus job classifications at the plants. (*Patterson* Respondents' Brief in Opposition 27, 30).

present disparities were largely beyond American's control (JA 8-9):

> The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further implementation. As indicated in the findings of fact, however, black and female employees in the Richmond Branch and the Virginia Branch have been locked in their jobs as a result of prior discriminatory practices. *This is because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring.* (Emphasis added.)

The specific employment practices found violative of Title VII were two portions of American's system held to perpetuate the effects of past discrimination in hiring and job assignment[8]: (1) American's practice of separate seniority at the two plants with loss of accumulated seniority in the event of transfer and (2) six lines of progression.[9]

In *Patterson I* the Fourth Circuit affirmed this finding. It too

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[8]The district court also found that American's selection of supervisory personnel violated Title VII, a finding which the *en banc* court of appeals has now directed be reconsidered (JA 148-154). The issues concerning the selection of supervisors are not involved in this appeal.

[9]The district court found that, of nine job lines of progression, three lines were justified under the then-applicable business necessity test. The three found so justified and not part of this appeal were: (1) adjuster helper-prefabrication to adjuster-prefabrication; (2) making or packing adjuster to overhaul adjuster; and (3) learner adjuster to adjuster (JA 31-32).

Six remaining job lines of progression, however, were found unlawful because they "perpetuated past discrimination on the basis of sex and race" and did not withstand analysis under the now discredited business necessity test (*id.*). The remaining six were: (4) packing or making machine operator or Schmermund box operator to learner ad-

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recognized the efforts that had been made to eliminate discrimination (JA 77):

> Although the company and the union have taken steps in recent years to correct some of the inequities of the past, the lines of progression, the lack of definite written job descriptions and barriers to transfer between the branches remain impediments to fair and neutral employment practices. Much must still be done to eradicate any taint of racial discrimination at the plant.

With respect to the lines of progression, liability was affirmed on the basis that they "perpetuated the effects of past discrimination" (JA 79) and did not meet the business necessity test with its emphasis on safety and no acceptable alternative (JA 79-80). This Court denied a petition for writ of certiorari in 1976.

Thereafter, while these cases were on remand to the district court for back pay proceedings, this Court rendered its decisions in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). Petitioners thereupon moved for relief from the prior finding of liability on the ground that it could no longer stand in light of these decisions. The district court denied relief, but in *Patterson II*, a panel of the Fourth Circuit reversed as to the practice of separate seniority at each plant and remanded for a determination whether that practice was "bona fide" within the meaning of § 703(h). However, the panel failed to include the lines of progression within the scope of that remand.

On rehearing, the court *en banc*, as had the panel, remanded for a determination whether the practice of separate seniority

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juster; (5) catcher to examiner-making; (6) line searcher-Schmermund boxer to examiner packing; (7) boiler operator to turbine operator; (8) assistant adt dryer operator to adt dryer operator; and (9) assistant textile dryer operator to textile dryer operator (JA 21-22).

at each plant was "bona fide" (JA 145-46). However, the court did not similarly remand as to the lines of progression. Although the issue whether the lines of progression were a "seniority system" and thus entitled to the same bona fides analysis under § 703(h) had been briefed and argued before the court *en banc*, the court did not decide that question. Rather, the majority of the court held that in its view "§ 703(h) simply has no application to American's job lines of progression policy, whether or not it be considered a 'seniority system' in the mode of its operation" (JA 142), and held that "the immunity accorded seniority systems by § 703(h) . . . run[s] only to those systems in existence at the time of Title VII's effective date" (JA 144).

Summary of Argument

Section 703(h) reflects the balance carefully struck by Congress between, on the one hand, the national policies reflected in Title VII of seeking the elimination of discrimination in the work place and encouraging voluntary action toward that end, and, on the other hand, the equally important national policies of fostering free collective bargaining and preserving the vital concept of seniority. This congressional balance gives seniority systems immunity from Title VII liability, absent a specific intent to discriminate. The express language of § 703(h), its unusual history, prior interpretations by this Court, and applicable policy considerations dictate that this immunity extend to *all* bona fide seniority systems, post- as well as pre-Act.

Congress used unrestricted language in § 703(h) which addresses *all* bona fide seniority systems. Had Congress meant to cover pre- but not post-Act systems, it easily could have done so. The court of appeals, however ignored the literal dictates of § 703(h) and was heedless of cardinal principles of statutory interpretation. As a result, it effectively and erroneously transformed the § 703(h) definitional provision into a "savings" or "grandfather" clause, even though it would be difficult to conceive of any more precise language Congress could have used to command coverage of both pre-Act and post-Act bona fide seniority systems.

The legislative history of § 703(h) does not support the interpretation that all seniority systems instituted or revised post-Act fall outside the ambit of the section. The isolated references to "established" and "existing" seniority in the Clark-Case and Justice Department memoranda so heavily relied on below (JA 144 & n.5) simply do not justify such a restrictive result. If anything, those memoranda, when considered in proper context, call for the opposite conclusion. In any event, because these statements do not address the specific issue presented here in unambiguous terms, they certainly are not evidence of a clearly expressed congressional intention contrary to the language of the statute itself.

When confronted with other issues of § 703(h)'s application, this Court has made it clear that the section is to be given an expansive, not restrictive, interpretation in recognition of the principle that significant freedom must be afforded employers and unions in the continuing process of collective bargaining to create and change seniority systems. *California Brewers Association* v. *Bryant*, 444 U.S. 598 (1980); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). The rule announced below would negate such freedom by compelling analysis of any post-Act seniority system solely on the basis of statistical disparate impact, regardless of the absence of any intent to discriminate. The critical elements of national labor policy encouraging the give and take of collective bargaining would thus be substantially impaired. In contrast, the holding sought herein by petitioners, which would apply § 703(h) to post- as well as pre-Act bona fide seniority systems, would preserve that freedom and be in complete harmony with Title VII's purposes and this Court's teachings that analysis of a seniority system must be premised on a search for purposeful discrimination.

In addition to the frustrating effect of the decision below on labor relations, it also will have a chilling effect on affirmative action. Post-Act changes in pre-Act seniority systems protected under § 703(h), although made to benefit persons covered by

the Act, will be discouraged because even such benevolent changes would take the system out of § 703(h). Such a result will be out of harmony with Title VII's purpose to act "as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate' " the effects of discrimination. *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 204 (1979), quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975).

ARGUMENT

I.

The Plain Language Of Section 703(h) Covers Post-Act As Well As Pre-Act Seniority Systems

A. The Court of Appeals' Holding

At stake in this case is the vitality of § 703(h) of Title VII, a provision which on its face accords immunity to all "bona fide seniority . . . system[s]," provided that differences pursuant to such systems "are not the result of an intention to discriminate." Notwithstanding such plain language, the majority of the court of appeals, after finding that the lines of progression were established after the Act's effective date, held that "the immunity accorded seniority systems by § 703(h) [runs] only to those systems in existence at the time of Title VII's effective date" (JA 144) and that "interests sought to be protected" by the provision were only "those seniority rights already vested in incumbent workers when Title VII went into effect" (*id.*; footnote omitted).

In explaining the effect of its ruling that § 703(h) has no application to seniority systems instituted after the effective date of Title VII, the majority stated that "[s]ystems initiated in the post-Act period must of course pass muster under the *Griggs*[10]

[10] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

[disparate impact] analysis in the same manner as other facially neutral policies or practices challenged as discriminatory in their consequences" (JA 144 n.5).

B. The Statutory Language Does Not Permit the Restrictive Interpretation Adopted Below

The narrow interpretation by the court of appeals holding § 703(h) inapplicable to seniority practices not in place at the time of Title VII's effective date is plainly inconsistent with the express language of the section and cannot survive analysis under longstanding canons of statutory interpretation.

As in any case involving statutory construction, this Court's "starting point must be the language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). A court "must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U.S. 1, 9 (1962). More often than not, there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Associations*, 310 U.S. 534, 543 (1940). "Absent a clearly expressed legislative intention to the contrary, that [express] language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 100 S. Ct. 2051, 2056 (1980).

Section 703(h) provides in pertinent part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant *to a bona fide seniority . . . system* . . . provided that such differences are not the result of an intention to discriminate . . . (Emphasis added.)

The literal language of § 703(h) provides compelling evidence against the restrictive interpretation adopted below. On

its face, this definitional[11] section makes no distinction between pre- and post-Act bona fide seniority systems. Had Congress meant to cover one but not the other, it easily could have done so simply by using a phrase such as "pursuant to *an existing* bona fide seniority system." But Congress did not choose such a course. Rather, Congress chose language addressing *all* bona fide seniority systems.

Significantly, the section is couched exclusively in words of present and future tense; *i.e.*, it "*shall* not be" unlawful "*to* apply" different employment conditions "*pursuant to* a bona fide seniority . . . system" (emphasis added). The clear import of such language is that § 703(h) is prospective in operation. It is intended to apply alike to pre-Act seniority systems and systems adopted or revised by employers post-Act.

The court of appeals did not point, nor could it point, to any equivocation or lack of clarity in the terms of the section itself. Rather, the court deviated from the plain language and thereby transformed the section into a "savings" or "grandfather" clause, exempting pre- but not post-Act systems, even though "it would be difficult to conceive of any more precise language Congress could have used to command"[12] coverage of pre-Act and post-Act bona fide seniority systems.

As the dissenters below aptly observed, "Congress undoubtedly knows how to write a grandfather clause if it wishes, but in this case wrote an exception instead" (JA 160 n.1). Indeed, the same Congress drafted and passed savings provisions in other parts of Title VII.[13] Section 703(h), on the other hand, is devoid of

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[11]In *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 761 (1976), the Court stated that § 703(h) is definitional, its thrust "directed toward defining what is and what is not an illegal discriminatory practice."

[12]*Richards* v. *United States*, 369 U.S. at 9.

[13]For example, § 701(b) as enacted called for application of the "employer" definition of the Act on an annual step-down basis (78 Stat. 253 (1964):

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any such savings limitation or condition on the protection accorded "bona fide seniority . . . system[s]." The natural and unmistakable inference is that § 703(h)'s clear lack of resemblance to typical savings clauses[14] was not unintentional.

Congress accordingly used language expressing the desire that

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> *Provided*, that *during the first year after the effective date* prescribed in subsection (a) of section 716, *persons having fewer than one hundred employees* (and their agents) shall not be considered employers, and, during the *second year* after such date, *persons having fewer than seventy-five employees* (and their agents) shall not be considered employers, and, during the *third year* after such date, *persons having fewer than fifty employees* (and their agents) *shall not be considered employers* . . . (Emphasis added.)

Section 701(e), as enacted, contained a similar step-down or savings definition for "labor organization." 78 Stat. 254 (1964). Likewise, Congress easily could have utilized limiting language had it intended that all post-Act seniority systems and revisions thereto were to fall outside the ambit of § 703(h); *e.g.*, "and provided that such seniority system was in existence on the effective date prescribed by subsection (a) of section 716"; or, "provided that this section shall protect only seniority rights vested on the effective date prescribed by subsection (a) of section 716." However, Congress did not do so.

[14]Savings or grandfather clauses are "calculated to prevent hardship by saving accrued rights and interests from the operation of a new rule." 2A Sutherland, *Statutory Construction* § 47.12 (4th ed. Supp. 1980). Such clauses invariably exempt an established class from new regulation so long as that class possessed certain characteristics by a date specified in the savings clause itself. *See, e.g.*, § 7(c) of the Transportation Act of 1958, 49 U.S.C. § 303, providing that "any person (or its predecessor in interest) [who] was in bona fide operation on May 1, 1958, over any route or routes or within any territory" could apply for an authorization to continue the operation that the applicant had previously performed. In *United States* v. *Citizens & S. Nat'l Bank*, 422 U.S. 86, 108 (1975), the Court considered an archetypal savings provision to the Bank Holding Company Act, 12 U.S.C. § 1849(d), which stated:

> Any acquisition, merger, or consolidation of the kind described in section 1842(a) of this title which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to July 1, 1966, shall be conclusively presumed not to have been in violation of any antitrust laws other than section 2 of Title 15 (§ 2 of the Sherman Act).

all bona fide seniority systems be protected. This plain statutory language was simply ignored by the court below. That court was "not at liberty to imply a condition which is opposed to the explicit terms of the statute . . . To [so] hold . . . [was] not to construe the Act but to amend it." *Detroit Trust Co.* v. *The Barlum*, 293 U.S. 21, 38 (1934).[15] "After all, Congress expresses its purpose by words. It is for us to ascertain — neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam* v. *United States*, 340 U.S. 593, 596 (1951).

II.

The Legislative History Supports The Construction That Section 703(h) Protects Post-Act As Well As Pre-Act Seniority Systems

Notwithstanding the unequivocal language of § 703(h) and its dissimilarity to a savings clause, the court of appeals considered its interpretation justified by the "legislative history of § 703(h)" which it variously described as "conclusively demonstrat[ing],"[16] "replete with indications,"[17] or at least "suggest[ing]"[18] that post-Act systems were not intended to be encompassed by § 703(h). In the main, the court of appeals relied on isolated references to "established" and "existing" seniority rights in two memoranda, the Clark-Case memorandum and a Justice Department memorandum, inserted in the Congressional Record (JA 144 n.5). Yet, just as the language of § 703(h) evinces no congressional intent to confine the section's application to pre-Act seniority systems, neither does this limited "legislative history" relied on below. To the contrary, that "history" standing alone is at best ambiguous on the issue presented here and falls far short of the showing needed to disregard the words Congress expressly employed.

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[15] *See also Fedorenko* v. *United States*, 49 U.S.L.W. 4120, 4126 (1981); *Diamond* v. *Chakrabarty*, 100 S. Ct. 2204, 2207 (1980).

[16] JA 144.

[17] *Id.*

[18] *Id.* at n.5.

Furthermore, such a tunnel-visioned view of the legislative history of § 703(h) ignores other facets of the section's history, such as the date of the Clark-Case and Justice Department memoranda relative to the date § 703(h) was first proposed, the limited concern to which those memoranda were responding and other statements in addition to those focused on by the court below. Viewed in its totality, the legislative history demonstrates that in enacting § 703(h), Congress was concerned with protecting the important concept of seniority in all its numerous and varied manifestations. Thus, contrary to the conclusion of the court below, the legislative history supports the construction that the section protects *all* bona fide seniority systems, post- as well as pre-Act.

On several occasions, this Court has reviewed the circumstances preceding the adoption of § 703(h). *See Teamsters*, 431 U.S. at 350-55; *Franks*, 424 U.S. at 758-62 (noting the "unusual legislative history" of the section and "the absence of the usual legislative materials" surrounding its adoption). In so doing, the Court has referred to the Clark-Case and Justice Department memoranda as "authoritative indicators of [§ 703(h)'s] purpose." *Teamsters*, 431 U.S. at 352. But neither *Teamsters* nor *Franks* expressly considered the issue presented here and in considering that issue, these "authoritative indicators" must be seen in full context.

It must be remembered that the memoranda were introduced into the record by Senator Clark on April 8, 1964, during the general debate on the bill passed by the House. They were drafted in response to criticisms of another Senator that the bill, which contained no predecessor to the eventual § 703(h), would, *inter alia*, "undermine the vested rights of seniority." 110 Cong. Rec. 7206 (1964). But "[n]one of these documents [was] read on the floor of the Senate, and there was no discussion of their contents or of this specific seniority issue, then or thereafter." Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1610 (1969). Nearly eight weeks later, on May 26, following a number of bipartisan leader-

ship conferences, the so-called Mansfield-Dirksen amendment was offered as a substitute for the entire bill. *See* Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 445-46 (1966). One of a number of amendments appearing for the first time was § 703(h).

The particular examples in these memoranda of Title VII's effect on seniority, *i.e.*, the references seized upon below to "established" and "existing" seniority, were not intended to be exclusive. Rather, they speak of the Act's effect on "existing" and "established" seniority only because that was the specific concern to which they were addressed.[19] It was well-established when Senator Clark introduced these memoranda that the National Labor Relations Act's policy of promoting collective bargaining "in respect to . . . conditions of employment"[20] was "broad enough to cover terms of seniority." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953). Given the issue to which the memoranda were responding and the common knowledge that seniority was a mandatory subject for collective bargaining,[21] it simply was not necessary for the memoranda specifically to address seniority systems instituted or revised post-Act. This is manifested by Senator Clark's remarks immediately after placing the Justice Department memorandum in the Record stating his overall conclusion that "it is clear that the bill would not affect seniority *at all*" and "would not affect the present operation of the

[19]Senator Clark prefaced his introduction of the Justice Department memorandum into the Record by stating (110 Cong. Rec. 7206 (1964)):

> I have also had prepared by the Department of Justice a summary statement in rebuttal to the argument made by the Senator from Alabama [Mr. Hill] to the effect that Title VII would undermine the vested rights of seniority.

[20]29 U.S.C. § 159(a).

[21]*See Industrial Union of Marine and Shipbuilding Workers of America* v. *NLRB*, 320 F.2d 615, 620 (3d Cir. 1963), *cert. denied*, 320 U.S. 984 (1964) ("seniority rights . . . are within the phrase 'wages, hours, and other terms and conditions of employment' and hence are mandatory bargaining subjects" (footnote omitted)); *NLRB* v. *Proof Co.*, 242 F.2d 560, 562 (7th Cir.), *cert. denied*, 355 U.S. 831 (1957) ("[n]or can it be doubted that seniority provisions . . . are among those 'conditions of employment' which the [NLRA] requires to be subjects of collective bargaining" (citations omitted)).

National Labor Relations Act or rights under existing labor laws." 110 Cong. Rec. 7207 (1964) (emphasis added).

As stated in *Franks*, Congress plainly designed § 703(h) as a clarification or definitional provision of what is and is not an unlawful employment practice under § 703(a).[22] This being the case, if Congress' concern in § 703(h) was to protect only pre-Act seniority systems it would have required no feat of legislative drafting skill to insert the terms "existing" or "established" before the statute's descriptive phrase, "bona fide seniority or merit system." Given the fact that the drafters of § 703(h) presumably had the Clark-Case and Justice Department memoranda before them, the absence of the terms "established," "existing" or any similar term of limitation in § 703(h) is an authoritative indicator that the drafting groups, and the Congress as a whole, did not intend any such limitation.

The unusual legislative drafting process that resulted in the formulation of § 703(h) is entirely supportive of this view. There is no evidence to indicate that the bipartisan leadership drafting group's omission in § 703(h) of limiting terms such as "established" or "existing" was anything other than deliberate. As the Court recognized in *Mohasco Corp.* v. *Silver*, 100 S. Ct. 2486 (1980), Title VII as finally enacted was "carefully forged," *id.* at 2493, by the bipartisan leadership of the Senate responsible for introducing, among other provisions, § 703(h). Legislative drafting at this highest congressional level, particularly "in light of the tempestuous legislative proceedings that produced the Act," *id.*, was necessarily done with utmost attention to detail and precise use of language.

In this regard, it is instructive to note that Senator Dirksen, in presenting to the Senate the Mansfield-Dirksen amendment including the newly-drafted § 703(h), stated after describing the bipartisan leadership drafting process (110 Cong. Rec. 11935 (1964)):

As I look back now upon the time that has been devoted

[22] 424 U.S. at 761.

> to the bill, I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. *We have tried to be mindful of every word, of every comma, and of the shading of every phrase.* (Emphasis added.)[23]

Considering these unique circumstances under which § 703(h) was drafted, no court should lightly read into the provision a limitation not employed by the Congress. Instead, it should regard the words used as sound indicia that the drafting group and the Congress did not intend to limit § 703(h).

Because the isolated references pulled from a mere part of the legislative history by the court below do not address the specific issue in unambiguous terms, they wholly fail to evince any clearly expressed legislative intention contrary to the language of the statute itself. *See Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 100 S. Ct. at 2056.[24] Indeed, the talismanic quality conferred by the court of appeals on such limited legislative history pales in comparison to the numerous expressions of Congress that the Act was not intended to displace or inhibit the national policy favoring seniority.

Concern for that policy was expressed right from the start of the consideration of the Act. In the dissenting Minority Report of the House Judiciary Committee, for example, the bill was criticized because it did not include a provision specifically protecting the concept of seniority (H.R. Rep. No. 914, 88th Cong., 1st Sess., 71 (1963)):

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[23]*See also* 110 Cong. Rec. 12707 (1964) (remarks of Senator Humphrey on the bipartisan leadership drafting group's concern with precision of language).

[24]*See also United States* v. *Oregon*, 366 U.S. 643, 648 (1961) (isolated statements in the legislative history "have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute"); *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945) ("[t]he plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction").

> *Seniority is the base upon which unionism is founded. Without its system of seniority, a union would lose one of its greatest values to its members.*
>
> *The provisions of this act grant the power to destroy union seniority.* The action of the Secretary of Labor already mentioned is merely the beginning, if this legislation is adopted. With the full statutory powers granted by this bill, *the extent of actions which would be taken to destroy the seniority system is unknown and unknowable.* (First emphasis added.)

No distinction was drawn in this report between seniority accruing before the Act and that which might come into existence subsequently. Thereafter, Congressman Celler, Chairman of the House Judiciary Committee, responded to this criticism by stating that the bill would not "destroy worker seniority systems" (110 Cong. Rec. 1518 (1964)):

> It has been asserted also that the bill would destroy *worker seniority systems* and employee rights vis-à-vis the union and the employer. This again is wrong. *The bill would do no more than prevent a union, as it would prevent employers, from discriminating* against or in favor of workers because of their race, religion, or national origin. (Emphasis added.)

As in the Minority Report, Congressman Celler drew no distinction between pre- and post-Act systems.

This concern with the national policy favoring seniority continued unabated as the bill, still without a seniority provision, proceeded to the Senate and was debated in the course of a long filibuster. In a telling statement, Senator Humphrey addressed critics by assuring (110 Cong. Rec. 6549 (1964)):

> This bill is *not an instrument to abolish seniority* or unions themselves, as some have charged. The only standard which the bill establishes for unions and management alike is that race will not be used as a basis for discrimina-

> tory treatment. *The full rights and privileges of union membership, as protected by other Federal laws and court decisions, will in no way be impaired.* As a longstanding friend of the American worker, I would not support this fair and reasonable equal employment opportunity provision *if it would have any harmful effect on unions.* The truth is that this title forbids discriminating against anyone on account of race. *This is the simple and complete truth about Title VII.* (Emphasis added.)

In the same vein, Senator Kuchel remarked that "[n]either would seniority rights be affected by this act." *Id.* at 6564. Neither Senator distinguished between seniority antedating the Act and seniority post-dating the Act.

As this Court has emphasized (*United Steelworkers* v. *Weber*, 443 U.S. at 206):

> Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.'[25]

Accordingly, the statutory words must be examined in a manner that "reconstitute[s] [this] gamut of values current at the time when the words were uttered." *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 620 (1967) (quoting L. Hand, J.). Instead of the unwarranted assumptions as to Congress' intent made by the majority below from a few references in only two documents, it is much more logical to conclude from the entire legislative history that Congress, committed to "[t]he national policy favoring collective bargaining"[26]

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[25] *See also Texas Dep't of Community Affairs* v. *Burdine*, 101 S. Ct. 1089, 1096 (1981) (Title VII "was not intended to 'diminish traditional management prerogatives' ").

[26] *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 49 U.S.L.W. 4347, 4349 (1981).

and seniority,[27] intended § 703(h) to be applicable to all seniority systems and revisions thereto, whether pre-Act or post-Act. The system is protected, so long as it is bona fide and not the result of purposeful discrimination.

III.

The Holding Sought By Petitioners Logically Follows From Prior Decisions Of This Court

In addition to the plain language of the statute and the result dictated by the full legislative history, this Court has instructed in several leading opinions that § 703(h) is to be broadly interpreted and is forward-looking in its application in order to ensure that significant freedom is afforded in the creation of seniority systems. A decision reversing the court of appeals and expressly holding post-Act seniority systems and revisions thereto entitled to the protection of § 703(h) absent proof of purposeful discrimination would be fully consistent with Title VII and these previous teachings.

In *Teamsters*, although not specifically deciding the issue presented here, the Court stated that "[s]ection 703(h) on its face immunizes *all* bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discrimination." 431 U.S. at 348 n.30 (emphasis added). Contrary to the restrictive interpretation below, the Court in *Teamsters* also appreciated that Congress' concern in enacting § 703(h) was not simply limited to seniority systems that would be frozen in place at the Act's effective date (*id.* at 355 n.41):

> [T]here is no reason to suppose that Congress *intended in 1964* to extend less protection to legitimate departmental seniority systems than to plantwide seniority systems. Then,

[27]Seniority in the collective bargaining context "lies at the core of our national labor policy," *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. at 79, and "[s]ignificant freedom must be afforded employers and unions to create differing seniority systems." *California Brewers Ass'n* v. *Bryant*, 444 U.S. at 608.

> *as now* [1977], seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression . . . The legislative history contains no suggestion that any one system was preferred. (Emphasis added; citations omitted.)

The Court recognized that no seniority system, "then" or "now," is ever carved in stone. The essence of *Teamsters* was that "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *Id.* at 352.[28]

Moreover, the *Teamsters* Court perceived that the key to § 703(h) was that seniority systems, because specially treated by Congress, required a different mode of analysis from other employment practices in ascertaining their status under Title VII. This is because analysis of legal effect under § 703(h) requires proof of purposeful discrimination. The decision of the court of appeals to relegate post-Act seniority challenges to "the general disparate impact test laid down in *Griggs*" (JA 145), rather than apply the *Teamsters* § 703(h) analysis requiring proof of purposeful discrimination, is an erroneous return to the discredited pre-*Teamsters* line of cases that had routinely struck down seniority systems merely on the basis of perpetuation of past discrimination, regardless of the presence or absence of discriminatory motive. *See, e.g., Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).[29]

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[28]As stated in the plurality and dissenting opinions in *California Brewers*, "Title VII of the Civil Rights Act of 1964 makes unlawful, practices, procedures, or tests that 'operate to "freeze" the status quo of prior discriminatory employment practices.' [citing *Griggs*] To this rule, § 703(h) of the Act . . . provides an exception" (444 U.S. at 600) (Stewart, J.); "[t]he effect of § 703(h) is to exempt seniority systems from the general prohibition on practices which perpetuate the effects of racial discrimination" (*id.* at 618) (Marshall, J., dissenting).

[29]Under the *Local 189* approach discredited by *Teamsters*, if the employer and union could not demonstrate that the seniority system was

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In addition, the court below incorrectly construed *Teamsters* by seizing on the "routine application" terminology and giving it such a "stringent reading" (JA 143 n.4) that any post-Act change in a pre-Act seniority system denies the system of § 703(h) protection simply because its application is then no longer "routine." This reading of "routine application" is not simply "stringent"; it is plainly wrong. The phrase "routine application" as it appears in *Teamsters* simply connotes the requirement that in its operation the system "appl[y] equally to all races and ethnic groups." 431 U.S. at 355. It does not mean that a change in a system prevents "routine application" of the system after the change.

Important also is this Court's decision in *Evans*. The Court, extending the holding of *Teamsters*, precluded a Title VII challenge to a seniority system that perpetuated the effects of a discriminatory *post*-Act event which had not been the subject of a timely complaint.[30] The post-Act event, illegal termination in 1968, although perpetuated through the operation of the seniority system by rehire in 1972 without restoration of seniority credit, did not constitute a continuing violation of Title VII. Such an untimely charged event, the Court held, was "the legal equivalent of a discriminatory act which occurred before the statute was passed." 431 U.S. at 558.

Evans thus teaches that an employer who discriminated post-Act in hiring and assigning but ceases such practices and adopts a seniority system after the time expires for filing a timely complaint as to those practices should be in no different position

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justified by "an overriding legitimate, non-racial business purpose," *i.e.*, that the particular seniority system was required by considerations of "safety and efficiency," then such a system constituted on-going discrimination regardless of the presence or absence of discriminatory animus. 416 F.2d at 989, 994. *See also Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (relied on by the majority in *Patterson I* in affirming liability with respect to the lines of progression, JA 79).

[30]*See California Brewers*, 444 U.S. at 600 n.2 (summarizing *Evans* holding).

under Title VII than an employer who had a seniority system in place on the effective date of the Act. Section 703(h) should be equally applicable to the adoption of that post-Act system as to the pre-Act system. Otherwise, the lesson of *Evans* that an employer is entitled "to treat that past act as lawful after respondent failed to file a [timely] charge of discrimination," *id.* at 558, is stripped of meaning and post-Act systems become relegated to a perpetuation concept, with its focus on numbers and disparate impact, regardless of the absence of any intent to discriminate.[31]

In *Evans*, the Court squarely rejected the narrow principle announced below that § 703(h) has no application to post-Act practices (431 U.S. at 560):

> The Court of Appeals read § 703(h) as intended to bar an attack on a seniority system based on the consequences of discriminatory acts which occurred prior to the effective date of Title VII in 1965, but *having no application to such attacks based on acts occurring after 1965. This reading of § 703(h) is too narrow.* The statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory. *But such a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit,* even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. *Such a result would contravene the mandate of § 703(h).* (Emphasis added; footnote omitted.)

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[31]To the extent liability was imposed in the instant case premised on perpetuation of the effects of a discriminatory act antedating the 1968 changes, *Evans* makes clear that such perpetuation could not be the basis of challenging the seniority system as a continuing violation, because such act had not been made the subject of a timely complaint under the 90-day rule then applicable (*see* n.4, *supra*). Section 706(d), 78 Stat. 260, 42 U.S.C. § 2000e-5(d) (current version at 42 U.S.C. § 2000e-5(e) (180-day rule)).

By construing § 703(h) as a "quite narrow exception" (JA 143 n.4) of no applicability to post-Act seniority practices, the court of appeals below committed the same fundamental error in approach to § 703(h) as that squarely rejected by this Court in *Evans*.

Equally supportive of the position that post-Act seniority practices should be within the scope of § 703(h) is *Trans World Airlines, Inc.* v. *Hardison*. The Court emphasized, without differentiating between pre-Act and post-Act practices, that "seniority systems are afforded special treatment under Title VII itself." 432 U.S. at 81. There was no suggestion, as baldly stated by the Fourth Circuit in this case, that a *Griggs* analysis would apply to post- but not to pre-Act seniority practices. Instead, *Hardison* coalesced the earlier teachings of *Teamsters* and *Evans* (432 U.S. at 82 & 82-83 n.13):

> Absent a discriminatory purpose, the operation of a *seniority system* cannot be an unlawful employment practice *even if the system has some discriminatory consequences.*
>
> . . . .
>
> . . . § 703(h) unequivocally mandates that *there is no statutory violation in the absence of a showing of discriminatory purpose. See United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558-560 (1977). (Emphasis added.)

The expansive interpretation of § 703(h) followed in *California Brewers* is also instructive. Therein, the Court made it clear that the term "seniority system" in § 703(h) should be liberally, not narrowly, construed (444 U.S. at 608):

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's *long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment.* It does not behoove a court to second-guess either that process or its products. Seniority systems, reflecting as they do, not only

> the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. (Emphasis added; citations omitted.)

Because seniority systems "inevitably come in all sizes and shapes," *id.*, the definitional thrust of the term "seniority system" in § 703(h) was designed by Congress to be forward-looking, and not static. "Significant freedom," *California Brewers* stated, "must be afforded employers and unions *to create* differing seniority systems." (*Id.*; emphasis added.) Such freedom would be illusory if any seniority system or revision thereto initiated after the Act was subject to *Griggs* analysis rather than to bona fides analysis under *Teamsters*.[32]

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[32]Not one circuit has agreed with the Fourth Circuit in holding seniority systems instituted or revised post-Act subject to *Griggs* analysis. Two circuits have analyzed such systems for presence or absence of bona fides and purposeful discrimination. In *Hameed* v. *International Ass'n of Bridge, Etc., Local 396*, 637 F. 2d 506 (8th Cir. 1980), the Eighth Circuit held that a referral seniority system initiated post-Act in a 1972 collective bargaining agreement "must be judged" under *Teamsters* and *Evans*, which "immunize bona fide seniority systems which have a disproportionate impact on blacks or other minorities, provided that any disparity is not the result of intentional discrimination." *Id.* at 516 (footnote and citations omitted). The *Hameed* court properly appreciated that for plaintiffs to prevail on the 1972 referral seniority system issue, "proof of discriminatory motive is critical." *Id.* Contrary to the approach of the Fourth Circuit, the Eighth Circuit correctly observed that "even if a disproportionate impact had been shown, the seniority system would not have been shown to be a prima facie violation of title [*sic*] VII because *Teamsters* immunizes seniority systems from attack under the disproportionate impact theories of *Griggs*." *Id.* at 517 n.12. In *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978), the Sixth Circuit drew no distinction for § 703(h) purposes between pre- and post-Act seniority practices, and analyzed the latter under the bona fides test.

Moreover, numerous district courts post-*Teamsters* have likewise reviewed post-Act seniority systems under bona fides analysis, requiring proof of discriminatory intent in the adoption or maintenance of a seniority system as a prerequisite for a finding of non-bona fides. *See, e.g., Johnson* v. *Burroughs Corp.*, 24 Fair Empl. Prac. Cas. 963 (S.D. Fla. 1980) (seniority system instituted in 1974 at a plant which did not

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In sum, the critical principle gathered from this Court's prior decisions is that seniority systems, whenever adopted or revised, are given special treatment by Title VII itself. The statement by the majority below that § 703(h) is a "quite narrow exception to Title VII's general coverage of all 'conditions of employment' " (JA 143 n.4) is simply beside the point. Although § 703 (h) applies to relatively few employment practices covered by Title VII, it does not follow that when an employment practice involves a seniority system, the protection provided by the section is to be narrowly applied. *Teamsters, Evans, Hardison* and *California Brewers* all instruct that when a seniority system comes within the ambit of the section, the section is to be liberally, not narrowly, construed.

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open until 1968 analyzed for bona fides under § 703(h)); *Sanders* v. *Sherwin Williams Co.*, 495 F. Supp. 571 (E.D. Mich. 1980) (pre-Act practices and post-Act revisions to seniority system analyzed for bona fides under § 703(h) notwithstanding claim of disparate impact); *Pate* v. *Transit District*, 21 Fair Empl. Prac. Cas. 1228, 1245 (N.D. Cal. 1979) ("[t]he seniority system *created* by collective bargaining agreements in effect . . . *during the period from 1968 through 1976*, because it applied equally to employees of all races, and was neither created nor maintained with a discriminatory purpose, was a *bona fide* seniority system" under § 703(h)(emphasis added)); *Edmondson* v. *United States Steel Corp.*, 20 Fair Empl. Prac. Cas. 1745 (N.D. Ala. 1979) (previous court-ordered seniority system established in May 1973 ruled bona fide under § 703(h) over claim of adverse impact); *Freeman* v. *Motor Convoy*, 20 Empl. Prac. Dec. ¶ 30,090, p.11,493 (N.D. Ga. 1979) (seniority system adopted in 1969 "when the shop and yard employees were organized" referred to a master for determination of bona fides under § 703(h)); *Edmonds* v. *S. Pac. Transp. Co.*, 19 Fair Empl. Prac. Cas. 1052 (N.D. Cal. 1979) (challenges to pre- and post-Act seniority system practices analyzed under the bona fides test of § 703 (h)); *Griffin* v. *Copperweld Steel Co.*, 22 Fair Empl. Prac. Cas. 1112 (N.D. Ohio 1978) (post-Act revisions to seniority system reviewed for § 703(h) bona fides); *EEOC* v. *McCall Corp.*, 24 Fair Empl. Prac. Cas. 432 (S.D. Ohio 1978), *aff'd sub nom., EEOC* v. *McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980) (1966 adjustment of line of progression incorporating workers without carryover seniority and challenged under perpetuation theory held bona fide under § 703(h) absent a showing of discriminatory purpose).

IV.

Unless Corrected, The Rule Announced Below Will Have A Chilling Effect On Labor Relations And Affirmative Action

Under the rule announced below, any new seniority system, or a post-Act revision to a pre-Act system, proposed in collective bargaining would have to withstand the difficult *Griggs* disparate impact analysis with its primary reliance on statistics[33] and its related burden of establishing a business necessity defense.[34] Management and labor would first have to be sure that the racial and sexual breakdown within departments, lines of progression or other seniority units mirrored the relevant statistics before the seniority practice could be implemented. Absence of discriminatory intent would be meaningless. Mere statistical disparity would defeat the proposal and a numbers game would become the substitute for the "[s]ignificant freedom [which] must be afforded employers and unions to *create* differing seniority systems." *California Brewers*, 444 U.S. at 608 (emphasis added).[35] The critical elements of national labor pol-

[33]Plaintiff in a case alleging disparate impact invariably establishes a *prima facie* case through a statistical showing of imbalance. *See, e.g., United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). The district court *sub judice* accepted this procedure (*see* n.3, *supra*).

[34]Lower courts have held defendants to exacting standards under the business necessity test, *see United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971) and pre-*Teamsters* courts rarely upheld a seniority system pursuant to claims of business necessity. *See, e.g., United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 451 (5th Cir. 1971), *cert. denied sub nom., Brotherhood of Locomotive Engineers* v. *United States*, 406 U.S. 906 (1972) (" '[t]o be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals,' " quoting *United States* v. *Bethlehem Steel Corp.*, 446 F.2d at 662). In the case at bar, the district court imposed the business necessity test (JA 9, 28, 32), as did the court of appeals (JA 79-80).

[35]Such a result would be contrary to the essence of collective bargaining, which is that "it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static." *Aeronautical Indus. Dist. Lodge 727* v. *Campbell*, 337 U.S. 521, 525 (1949).

icy recognizing "the give and take of free collective bargaining [and] the specific characteristics of a particular business or industry," *id.*, would thus be substantially impaired.

These results would follow notwithstanding that a key aspect of national labor policy, reflected in statutes governing relationships between employers and unions,[36] "encourages the negotiation of terms and conditions of employment through the collective-bargaining process." *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 49 U.S.L.W. 4347, 4349 (1981); *see also Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 62 (1975) (recognizing the national labor policy "encouraging the practice and procedure of collective bargaining"). That collective bargaining process invariably includes negotiation of seniority provisions, as "[s]eniority has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey* v. *Moore*, 375 U.S. 335, 346-47 (1964); *see also Franks*, 424 U.S. at 766.[37]

As the Minority Report of the House Judiciary Committee recognized, seniority is "the base upon which unionism is founded." H.R. Rep. No. 914, 88th Cong., 1st Sess., 71 (1963). But seniority is not simply of overriding importance to unions and employees alone. Employers also have a vital interest in seniority and in re-shaping seniority systems on an on-going basis to maximize efficiency and minimize costs of production (U.S. Dep't of Labor, Bulletin 908-11, *Collective Bargaining Provisions*—Seniority, 14 (1949)):

> Management customarily prefers narrower seniority units, preferably by job classification or department, in order *to*

[36] *E.g.*, the National Labor Relations Act of 1935, 29 U.S.C. § 151 *et seq.*; the Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.*

[37] In *Franks* the Court noted that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast *and increasing importance* in the economic employment system of this Nation," 424 U.S. at 766 (emphasis added), citing to S. Slichter, J. Healy, & E. Livernash, *The Impact of Collective Bargaining on Management*, 104-115 (1960).

> *establish competition between the same skills, to prevent excessive displacement of workers and numerous transfers* from one department to another, *and to eliminate high training costs.* The types of seniority incorporated in agreements probably reflect attempts to reconcile the view that the wider unit gives the greatest protection with the belief that *some kind of limitation on departmental, occupational, or geographic lines is necessary for productive efficiency.* (Emphasis added.)[38]

There are myriad legitimate reasons, then, why new or revised seniority systems may be proposed at the bargaining table. There are equally as many legitimate considerations that shape the end result, including the different perspectives of management and labor, their relative bargaining strengths and the number and relative importance of other matters that are up for consideration at the same time.[39] Absent significant freedom to bargain over such issues, the give and take essential to the collective bargaining process is curtailed.

Congress, in adopting Title VII, was certainly aware of the national labor policy encouraging such free collective bargaining and recognizing the importance, diversity and changing nature of seniority practices. The decision below turns this critical policy on its head by commanding application of a harsher legal standard to post-Act seniority systems and revisions.[40] If

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[38]*See also* Slichter, et al., *supra* at 181, wherein Professor Slichter observed in 1960: "Although management once felt that promotion decisions were one of its most important prerogatives, it is now coming to realize that proper use of the seniority criterion in these decisions is not necessarily incompatible with efficiency and employee morale."

[39]As this Court recognized as long ago as 1949, "[t]here are great variations in the use of the seniority principle through collective bargaining." *Aeronautical Indus. Dist. Lodge 727* v. *Campbell,* 337 U.S. at 526.

[40]Should the result below prevail, the fear of the dissenting Minority Report of the House Judiciary Committee that Title VII would *"grant the power to destroy union seniority"* would surface and "[s]eniority [as] the base upon which unionism is founded" would be undermined. H.R. Rep. No. 914, 88th Cong., 1st Sess., 71 (1963) (emphasis in original).

adopted here, it would deny the fact that seniority provisions "assume an almost infinite variety" and must constantly be adopted and altered "to meet changing or unforeseen situations." Aaron, *Reflections On The Legal Nature And Enforceability Of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962).

Furthermore, the inevitable result of the pre-Act/post-Act dichotomy in the applicable analyses under § 703(h) would have an unfortunate, damaging effect on affirmative action. The majority below held § 703(h) inapplicable to all post-Act seniority system "change[s] and formalization[s] (*whether in favor of or against employee interests*)" (JA 143 n.4; emphasis added). As a consequence, good-faith changes in pre-Act seniority systems made after the effective date of Title VII, even though they benefit persons covered by the Act, will be discouraged because such a change would consign the system to a *Griggs* analysis and make valueless a laudatory intent to lessen or eliminate discriminatory effects. Pre-Act systems will be retained unchanged in order to preserve § 703(h) protection and its bona fides analysis pursuant to *Teamsters*.

Such a result would be contrary to this Court's observation in *Franks* that (424 U.S. at 779):

> the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority,' is certainly no less than in other areas of public policy interests. *Pellicer* v. *Brotherhood of Ry. & S.S. Clerks*, 217 F.2d 205 (CA5 1954), cert. denied, 349 U.S. 912 (1955). See also Cooper & Sobol, 82 Harv. L. Rev., at 1605.

A decision affording § 703(h) protection to post-Act seniority systems and revisions thereto provided they are not made with an intent to discriminate would provide an incentive to employers and unions to modify seniority practices for the purpose

of furthering the important national interest in eliminating discriminatory effects in the workplace.[41]

Until the decision below, *Teamsters* and *Evans* could be logically read to provide employers and unions with this powerful incentive today to consciously adopt or revise seniority practices in an effort to ameliorate any effects of past discrimination, be they pre-Act or post-Act effects, without fear of losing the statutory protection of § 703(h). A rule stripping any post-Act seniority modification of this statutory protection and relegating good faith seniority changes to the burdensome analysis of *Griggs* will discourage such attempts to broaden employment opportunities.

This unfortunate effect of the court of appeals' rule was correctly pointed out by the dissenters, who noted that even a post-Act change made "in favor of a class of black employees, will deprive the company and the union making the change from the benefit of a § 703(h) exemption" (JA 183). Such prohibitive effect of the majority's ruling runs directly contrary to this Court's observation in *United Steelworkers* v. *Weber*, 443 U.S. at 204 (citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 418 (1975)), that Title VII is "intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to

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[41] *See United States* v. *City of Miami, Fla.*, 614 F.2d 1322, 1341 (5th Cir. 1980):

> To say that a seniority system is immunized from attack means that the employer cannot be forced against its will to modify the system, not that the employer cannot agree to change it.
>
> . . . Just as a collective bargaining agreement may, for the purpose of furthering public policy interests beyond what is required by statute, enhance the seniority status of certain employees even though to some extent this will be detrimental to the expectations of other employees [citing *Franks*], so may an employer voluntarily consent to changes in seniority provisions that do not abridge contractual, statutory or constitutional rights of its employees or their bargaining agent to further important public policy interests.

eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' "[42]

The restrictive principle announced below impedes collective bargaining in the important area of seniority. It inhibits management and labor from adopting employment practices to meet a changing economy or industry. It jeopardizes hundreds of diverse seniority systems established or revised in American industry in the sixteen years since Title VII's enactment. It puts a significant damper on good faith efforts made in the spirit of affirmative action to overcome vestiges of past discrimination. It must be rejected.

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[42]The dissent recognized this conflict with *Weber* (JA 184):

> That part of the majority opinion providing that a company and a union cannot alter a seniority system so as to make more favorable the conditions of employment of minority employees is directly contrary to *Weber*, I think. It requires a too strained construction of the statute to hold that a seniority system admittedly discriminatory in effect, as in *Teamsters*, is protected by § 703(h) so long as it remains unchanged, but if it is changed in favor of the minority employees, then the employer and the union lose their § 703(h) exemption.
>
> . . . Such a conclusion, I suggest may sound astonishing, yet that is precisely what the majority holds.

CONCLUSION

For these reasons, the decision of the court of appeals should be reversed and the case should be remanded for a determination whether the lines of progression are bona fide under § 703 (h) and not the result of an intention to discriminate.

HENRY T. WICKHAM (Counsel of Record for American)
STEPHEN A. NORTHUP
MAYS, VALENTINE, DAVENPORT & MOORE
P.O. BOX 1122
Richmond, Virginia 23208
(804) 644-6011

PAUL G. PENNOYER, JR.
BERNARD W. MCCARTHY
PETER N. HILLMAN
MARY T. YELENICK
CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10112
(212) 541-5800

Counsel for Petitioners The American Tobacco Company, a Division of American Brands, Inc., and American Brands, Inc.

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